IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 81

THOMAS N. GRIGGS

v.

COUNTY OF ALLEGHENY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF ALLEGHENY AIRLINES, INC., AMERICAN AIRLINES, INC., EASTERN AIR LINES, INC., LAKE CENTRAL AIRLINES, INC., MOHAWK AIRLINES INC., NORTHWEST AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., AS *AMICI CURIAE*.

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THE INTEREST OF THE *AMICI CURIAE*

This Brief is submitted on behalf of Allegheny Airlines, Inc., American Airlines, Inc., Eastern Air Lines, Inc., Lake Central Airlines, Inc., Mohawk Airlines Inc., Northwest Airlines, Inc., Pan American World Airways, Inc., Trans World Airlines, Inc. and United Air Lines, Inc. as *amici curiae*, with the consent of both parties.

The case was brought by Griggs, a neighboring landowner, against the County of Allegheny, as owner and operator of the Greater Pittsburgh Airport. He claimed a taking by the County because of alleged low and frequent flights of aircraft over his property in connection with landings and take-offs at the Airport. Neither the airlines nor other airport users were made defendants. However, some of the airlines that use the Airport are defendants, along with the County, in other suits that are still pending, which were brought by petitioner Griggs and other neigh-

boring landowners for (1) injunctive relief against the County and all the commercial airlines, and (2) for damages for a "taking". *Gardner* v. *County of Allegheny*, 382 Pa. 88, 114 A. 2d 491 (1955); 393 Pa. 120, 142 A. 2d 187 (1958). It was because the Supreme Court of Pennsylvania in the *Gardner* case had refused to determine the claim for a taking against the County, on the ground that the proper procedure to recover such damages from the County was under the Pennsylvania statute governing eminent domain, that the present action was begun; and the pending equity proceedings against the airlines and the County in the *Gardner* case were stayed until completion of these eminent domain proceedings against the County. 393 Pa. at 130, 142 A. 2d at 193.

The three Viewers appointed in this case by the Court of Common Pleas of Allegheny County found that the County had condemned or appropriated a "superterranean easement" over Griggs' property and awarded him $12,690 in damages. (R. 37)* In doing so they found as facts that:

> "30. All flights into and out of the Greater Pittsburgh Airport are regulated by the Civil Aeronautics Administration of the United States of America.
>
> "31. No flights of aircraft have been shown to be in violation of any regulations of the Civil Aeronautics Administration.
>
> "32. No flights were shown to be lower than necessary for a safe landing or a safe taking-off." (R. 34, 49).

The Court of Common Pleas sustained the award (R. 75), but the Supreme Court of Pennsylvania reversed (R. 80), with two of the Justices dissenting (R. 88). *Griggs* v. *County of Allegheny*, 402 Pa. 411; 168 A. 2d 123 (1961).

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* "R." is the form of reference used to pages in the Transcript of Record which was filed by petitioner.

In holding the County of Allegheny not liable for a taking, the majority commented (R. 86) that:

> "... it would seem that he [the plaintiff] should look for relief to the owners or operators of the aircraft which have made the complained of flights through the air space above his land."

To this the dissenting Justices replied (R. 96):

> ". . . under the facts herein this position is legally unsound and realistically impossible."

A majority of the Supreme Court of Pennsylvania have thus indicated that they are prepared to hold the airport users liable to plaintiff. One effect of such a decision would be that even though commercial airlines are invited, and, as we shall see, required, to use particular airports and runways, and even though they do so in the manner required by Federal law as well as by the necessities of safe operation. they would nevertheless be held liable to adjoining landowners whenever take-offs and landings necessarily and unavoidably were low enough to cause damage that would constitute a taking of the landowners' property under the principles stated in *United States* v. *Causby*, 328 U. S. 256 (1946).*

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* Technically, since airlines here have no right of eminent domain, any action against them would lie in tort, such as trespass or nuisance, rather than in an action for a taking such as might lie against a governmental agency.

We are assuming, only for the purposes of this brief, that plaintiff satisfied the requirements for recovery against someone as set forth in the *Causby* opinion. It may be observed, however, that the evidence introduced by plaintiff is scant, very general, and inevitably inaccurate as to the altitudes, courses and frequencies of flights of aircraft. Also it may be questioned whether noise "comparable to that of a noisy factory" or "riveting machine or steam hammer" (R. 33) that emanates from a lawful activity is actionable. The defendant, relying on its legal position that plaintiff had not sustained his burden of proof (R. 61), introduced no evidence at all.

Such a result not only would be unfair to the landowners, for reasons set forth in petitioner's brief, but (1) would be incompatible with the national policy of encouraging and fostering an air transportation system adapted to the "needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense" (Federal Aviation Act, §102(a); 72 Stat. 740; 49 U. S. C. §1302(a) (1958)), and (2) would contravene both the commerce and the due process clauses of the United States Constitution by subjecting the airlines to liability for doing what Federal law compels them to do in an area preempted by the Federal Government.

Since the impact of the decision below will not be limited to the Greater Pittsburgh Airport, the questions here raised are of vital importance to the airlines, and indeed to the national air transportation system.

THE FACTS AS TO AIRPORT OPERATION.

The basis for the airlines' position will appear from a brief description of the manner in which public airports, including the Greater Pittsburgh Airport, are constructed and operated.

The Airport is Located by the Community Subject to Federal Approval.

No community can receive the benefit of air transportation service unless it provides an airport. The airport is customarily built by a public agency, which possesses the power of eminent domain. The public authority responsible for the airport decides where it will be built, what runways will be constructed, their direction and length, and what land or avigation easements will be acquired. In such matters the airlines customarily have neither the

opportunity to take the initiative nor any decisive, or even substantial, voice.

The Federal Government, in furtherance of the national air transportation policy, also has a direct interest in the location and adequacy of airports. The Greater Pittsburgh Airport, like many other public airports, was financed in part by the Federal Government. Such part is normally 50%. 60 Stat. 175 (1946), as amended; 49 U. S. C. 1109 (1958). This means that the airport plans must be approved by the Federal Aviation Agency. 64 Stat. 1263 (1950), as amended; 49 U. S. C. §1108 (1958). See 14 C. F. R. Part 550 (1961).

Thus, the geographical relationship of the Greater Pittsburgh Airport and its runways to plaintiff's property was determined by the County with the approval of the Federal Government.

By its Grant Agreement the County Assumed Responsibility for Land or Airspace Acquisitions Outside the Bounds of the Airport.

The Grant Agreement, dated September 21, 1948, between the Administrator of Civil Aeronautics* and the County of Allegheny provided in part as follows (R. 104):

> "(i) Insofar as is within its powers and reasonably possible, the Sponsor [the County] will prevent the use of any land either within or outside the boundaries of the Airport in any manner (including the construction, erection, alteration, or growth of any structure or other object thereon) which would create a hazard to the landing, taking-off or maneuvering of

* Under the Civil Aeronautics Act of 1938 (c. 601, 52 Stat. 977), an Administrator of Civil Aeronautics and the Civil Aeronautics Board were responsible for air safety. Under the Federal Aviation Act of 1958 (72 Stat. 752, as amended; 49 U. S. C. §§1301-1542 (1958), as amended), the Federal Aviation Agency ("FAA") was established to take over the responsibility for air safety.

> aircraft at the Airport, *or otherwise limit the usefulness of the Airport.* This objective will be accomplished either by the adoption and enforcement of a zoning ordinance and regulations *or by the acquisition of easements or other interests in lands or airspace,* or by both such methods." (Emphasis supplied)

Both the Federal Government and the County of Allegheny were thus aware, thirteen years ago, that easements or other interests in land or airspace outside of the boundaries of the airport might have to be acquired to prevent the usefulness of the airport from being limited. The County of Allegheny expressly assumed responsibility for such acquisitions. It was a part of the price the County was willing to pay in order to provide adequate air transportation service for the important and populous area which it represented. (For the airlines' participation in such cost, see page 18, *infra.*) To the extent, if any, that a right of action for damages, or an injunction, inheres in neighboring landowners because of annoyance from flights conducted as required by law, the usefulness of the airport is limited by inconsistent land uses which the County bound itself to eliminate.

Airlines Certificated to Pittsburgh Must Use This Airport.

The airlines operate under Federal certificates of public convenience and necessity, which specify the cities that must be served. No interstate commercial air transportation can be provided without such a certificate. Once a certificate is granted to an airline it must render "safe and *adequate* service". Federal Aviation Act of 1958, §404(a); 72 Stat. 760; 49 U. S. C. §1374(a) (1958) (emphasis supplied). See *Capital Airlines, Inc.* v. *Civil Aeronautics Bd.*, 281 F. 2d 48 (D. C. Cir. 1960); *Fort Worth Investigation,* Supplemental CAB Opinion and Order (Sept. 14, 1960) 1A CCH Av. L. Rep. ¶21,060 (where the Board expressly ordered that

jet service be provided for Fort Worth). And a certificated airline is forbidden to abandon "any route or part thereof" without the permission of the Civil Aeronautics Board. Federal Aviation Act of 1958, §401(j); 72 Stat. 754; 49 U. S. C. §1371(j) (1958). See *Service in New England States Case*, 11 C. A. B. 156, 175 (1950). Nor is this all. For example, the Greater Pittsburgh Airport is the terminal point for the Pittsburgh metropolitan area and its environs for the receiving and dispatching of United States air mail. Mail transportation is an additional service which the airlines are under a federal obligation to perform when so authorized by their certificates. Federal Aviation Act of 1958, §401(1); 72 Stat. 754; 49 U. S. C. 1371(l) (1958). For a multitude of reasons, the certificated airlines must render "safe and adequate service" to the community at the airport and on the runways provided by it.

The County Agreed That This Airport Would be Suitable for the Airlines' Use.

The airport operators and airlines enter into agreements whereby the airlines pay user charges, such as landing fees and rentals, for the use of the airport and its facilities. The airport agrees that the facilities will be appropriate for the airlines to use. Such agreements at Greater Pittsburgh Airport were uniform (R. 16). Each contained an article in which the County agreed that "in consideration of payments hereunder • • • Airline shall peaceably have and enjoy the premises herein granted and all the rights and privileges of the airport, its appurtenances and facilities granted herein." An airline could not peaceably enjoy the rights, privileges and facilities of the Airport if, as here, in the normal, lawful, and necessary course of operations, that very usage subjected it to injunctions or damages by reason of the Airport's failure to have obtained the necessary avigation easements.

The Flight of Aircraft, Especially in and out of a Major Airport, is Regulated in Detail by the Federal Government.

Air traffic to and from such major airports as Pittsburgh is controlled in detail by the Federal Government While aircraft are aloft, and as they come to the airport, they must follow courses and use runways prescribed by the FAA tower operators, whose determinations are of course, in turn, largely dictated by weather and traffic conditions. Similarly, aircraft use a particular runway, and take off or land, only with the permission and in accordance with the instructions of the tower operators. Holding patterns and the paths of approach and departure are prescribed by Federal rule. All of these tower instructions and rules are designed to insure safety and efficiency of flight.* See generally the Air Traffic Rules, 14 C. F. R. Part 60 (1961).

The Aircraft Themselves, and even Aircraft Parts, Must be Approved by the FAA

The FAA also licenses the type of aircraft to be employed. See 14 C. F. R. Part 1 (1961). It prescribes

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* The 1958 Federal Aviation Act also authorized the Administrator to prescribe air traffic rules for, *inter alia*, "the protection of persons and property on the ground." §307(c), 72 Stat. 749, 49 U. S. C. §1348(c) (1958). There are indications in the congressional history that it was the understanding of the congressmen responsible for the 1958 Act, and of the Congress that enacted it, that this clause in Section 307(c) gave the Administrator power to act to reduce the noise annoyance of flights. See House Committee on Interstate and Foreign Commerce, *Hearings Before a Subcommittee on the Federal Aviation Act (H. R. 12616)*, 85th Cong., 2d Sess., 267-69 (testimony of Representative Flynt), 325 (testimony of Mr. Delos Rentzel, former CAA Administrator and CAB Chairman) (1958). The Annual Reports of the FAA (1959, p. 18; 1960, p. 33) show how it has embarked since 1958 upon its program to deal with the noise problem. The FAA has just issued an amendment to 14 C. F. R. §60.18, applicable to all air traffic in the vicinity of airports with control towers, one purpose of which is to alleviate the airport noise problem. 26 Fed. Reg. 9069 (Sept. 27, 1961).

standards and issues certificates with respect to the manufacture, servicing and in-flight operation of aircraft and aircraft parts and supplies. For example, noise suppressors (now in general use on commercial jets in this country) may not be used without FAA approval. 14 C. F. R. Parts 4b, 13, 18 (1961). No plane may fly without an airworthiness certificate and each plane must comply with aircraft operating limitations prescribed for that specific aircraft. 14 C. F. R. §43.10 (1961). The weight of each commercial plane, on each flight, must not exceed an authorized maximum take-off weight and an authorized maximum landing weight. 14 C. F. R. §43.11 (1961).

In the present case the findings were that the flights over plaintiff's property were sufficiently disturbing to be actionable under the *Causby* doctrine, even though no flights were in violation of any regulations of the Civil Aeronautics Administration or lower than necessary for a safe landing or a safe taking off. (Findings Nos. 30-32, quoted in full at page 2, *supra*)

This means that lawful flights along the paths required as a result of the direction of the runways and the FAA regulations and instructions could not have avoided interfering with plaintiff's property. Such interference could have been avoided only by action over which the airlines using the airport had no control. The airport could have been closed down, hardly an action which would have been in the best interests of Pittsburgh or the County of Allegheny (or the public generally) or one which would even have been considered by them. The runway in question could have been closed by the airport; but the effect of this would have been to transfer the interference to other adjacent landowners or to close the airport for substantial

periods of time, whenever the wind direction required use of that runway. Due to the speed of flight and the close interrelation among airports on the same routes, any such intermittent closure would, of course, have made coordinated scheduling impossible and interfered with effective service. The national interest would not permit such a situation.

Transportation, whether it be by air, rail or road, produces some annoyance and inconvenience to the public, but the welfare of the country is dependent upon transportation. In the case of transportation by air, the needs of domestic and foreign commerce, as well as of the national defense,* have produced modern, more powerful, faster, and noisier planes; but, for the reasons explained above, airlines have no choice other than to fly such planes to and from the airports provided by the localities and in the manner required by the Federal Government.

Before turning to our argument, and in order to present the full picture, it should be noted that the commercial air carriers have been trying to do their part towards lessening the noise by promoting the development of quieter equipment and the use of noise suppressors, by the removal or restriction of training flights at urban airports when practicable, by cooperating in the development and observance of less annoying flight patterns, where consistent with safety, and by other means. See testimony of James T. Pyle, Deputy Administrator of the FAA, in Hearings Before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 87th Cong., 1st Sess., April 12, 1961 (as released by the FAA; printed transcript not available); Aviation Week, Sept. 19, 1960, p. 41.

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* Under the C. R. A. F. Program four-engine commercial planes are subject to 24 hours call by the government in the event of an emergency.

ARGUMENT.

Assuming as we do for the purposes of this argument that there has been an actionable interference with the property rights of plaintiff, the question presented is whether the liability created is that of the Federal Government, the County of Allegheny or the airport users. It is the position of these *amici curiae* that to impose this liability upon the airport users, as suggested by the Supreme Court of Pennsylvania, would be inequitable, unconstitutional, and wholly impractical.*

As far as we have been able to ascertain, no court has yet held a commercial air carrier liable for damages on any theory in a case such as this where lawful flights were conducted in compliance with Federal regulation. See *Note*, 74 Harv. L. Rev. 1581, 1585 (1961).

On the facts as found here the airlines could not legally or practically avoid flying over plaintiff's property. They were, and are, required by law to serve the Pittsburgh metropolitan area. They must use the only airport which the County provides and which the County has invited them to use. They must use the runway which takes them over plaintiff's land low enough to cause annoyance when FAA (formerly CAA) instructions so require. Thus a combination of County action in providing the airport and runways and of Federal regulations requiring the airlines to serve Pittsburgh and instructing them how to conduct flights to and from Greater Pittsburgh Airport resulted in the flights which interfered with plaintiff's property rights.

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* For a similar view see Note, *Airplane Noise: Problem in Tort Law and Federalism*, 74 Harv. L. Rev. 1581, 1587-88 (1961).

These flights were made in full compliance with Federal regulations and at altitudes no lower than necessary for landing and taking off (Findings Nos. 31-32, p. 2, *supra*). There is not the slightest suggestion in the record that the commercial aircraft involved were flown in an erratic, improper or unnecessarily annoying manner.* If the directions of the runways and the limited amount of peripheral land and avigation easements acquired by the owner of the airport, together with the Federal regulations, were such as to make it necessary for aircraft landing or taking off to fly at such a level as to cause annoyance to the owners of adjacent properties, such flying was not the responsibility or fault of the operators of such aircraft. Indeed, they were without power to avoid such flights. For the State of Pennsylvania to hold them responsible for damage to underlying property caused by such lawfully conducted flights would be an arbitrary deprivation of their property without due process of law, as well as an intolerable interference with the operation of the Federal regulatory system in an area preempted under the commerce and supremacy clauses.

Interstate air transportation is obviously a subject requiring uniform control, over which Federal regulation is and necessarily must be "intensive and exclusive". *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S. 292, 303 (1944) (concurring opinion of Mr. Justice Jackson).** *Cf.*

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* There is one reference in Mr. Griggs' testimony to "jets playing" (R. 25, line 26), but no commercial jets were in operation until 1958, long after the dates of his observations and notes.

** "Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. . . . It takes off only by instruction

Bibb v. *Navajo Freight Lines*, 359 U. S. 520 (1959); *Bethlehem Steel Co.* v. *New York Labor Relations Bd.*, 330 U. S. 767 (1947); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945).

All four criteria by which Congressional intent to preempt state regulation may be inferred, as stated by this Court in *Rice* v. *Sante Fe Elevator Corp.*, 331 U. S. 218, 230 (1947), are amply met in this field. The scheme of federal regulation of air traffic is so pervasive that no room is left for the States to supplement it; the federal interest is not only overwhelming but inevitable, due to the nature of air traffic, the speed of flight (see Scientific American, Dec. 1960, pp. 47-55) and the interrelation with air defense; the object of the Acts of Congress—a safe, modern and efficient national and international system of air transportation—requires exclusive federal control; and, finally, local regulation of air traffic, including such state court rulings as that suggested by the Supreme Court of Pennsylvania, which would hold airport users liable for annoyance caused by necessary flight operations conducted pursuant to Federal law, would be inconsistent with the aforementioned objectives of said Acts. The field of air traffic regulation has been preempted by the Federal Government. *Allegheny Airlines, Inc.* v. *Village of Cedarhurst*, 238 F. 2d 812 (2d Cir. 1956) so held (p. 815):

> "The federal regulatory system . . . has preempted the field below as well as above 1,000 feet from the ground."

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from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government." 322 U. S. at 303.

But the Supreme Court of Pennsylvania did not consider the effect of federal preemption.*

If state courts were permitted to allow damages or injunctions for flights conducted as required by the Federal regulations, there would be an impossible conflict between state law and Federal statutory policy, with the airlines caught squarely in the middle. *Cf. Farmers Union* v. *WDAY*, 360 U. S. 525, 535 (1959). The situation resembles that earlier faced by this Court in the case of the railroads, where it said that to allow tort actions against the railroads for disturbances that were necessary and incidental concomitants of proper operations would "bring the operation of railroads to a standstill". *Richards* v. *Washington Terminal Co.*, 233 U. S. 546, 555 (1914).

The Pennsylvania statute referred to by the court adds no support to its suggestion that airport users be held liable for damage caused by lawful landings and take-offs. That

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* *Huron Portland Cement Co.* v. *City of Detroit*, 362 U. S. 440 (1960), in which a Detroit ordinance limiting the amount of smoke which steamships could emit was held valid, did not involve as intensive or exclusive a system of federal regulation, or a subject matter where nationwide detailed regulation was imperative to the uninterrupted safe flow of commerce. As stated by Mr. Justice Jackson in *Northwest Airlines, Inc.* v. *Minnesota, supra*, at page 303:

> "... Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time."

In *Huron* there was no direct conflict because the shipowners could have complied with local law by the installation of a different type of boiler, and still have complied with all federal laws. Furthermore, the imposition of penalties by the City of Detroit did not conflict with the federal regulation and licensing of equipment, while here the very imposition of damages or injunctions against the airlines would conflict with the federal control of air traffic. The airport users were and are directed by the Federal Government to fly through the very airspace, and in the very manner, which the Supreme Court of Pennsylvania has suggested would result in liability under Pennsylvania law.

Act (Pa. Stat. Ann., tit. 2, §1469 (Supp. 1960)) provides that the aircraft owners and pilots, or either of them, shall be liable for damage to persons or properties below "caused by the ascent, descent, or flight of aircraft, or the dropping or falling of any object therefrom, in accordance with the rules of law applicable to torts on land." But, apart from the fact that this type of statute has not heretofore been understood to deal with damages caused by lawful, normal flights (see pp. 23-26 of petitioner's brief), we are here dealing with an area of conduct that must be free from state regulation. An award of damages against airport users under the facts of the present case for conduct not only permitted but required would constitute a penalty for obedience to federal law. As this Court said in *San Diego Unions* v. *Garmon*, 359 U. S. 236, 246-47 (1959):

> "Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme."

Congress itself has now made it crystal clear that flights such as those in this case (see Findings Nos. 30-32, p. 2, *supra*) are in the public domain. Section 104 of the Federal

Aviation Act of 1958 provides, as did its predecessor acts in substance, that

> "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States." 72 Stat. 740; 49 U. S. C. §1304 (1958).

Congress in Section 101(24) of the 1958 Act defined "navigable airspace" to mean

> ". . . airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, *and shall include airspace needed to insure safety in take-off and landing of aircraft.*" (Emphasis supplied.) 72 Stat. 737; 49 U. S. C. §1301(24) (1958).*

If aircraft fly no lower than is necessary for safety in taking off and landing, they are flying in space set aside for them by Congress; and when they follow the rules and instructions of the FAA as to runways and flight paths and patterns, they are flying in that space lawfully and properly.

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* Petitioner's brief (pages 5, 6, 22, 32) erroneously assumes that navigable airspace does not include the area below 500 feet necessary for taking off and landing. Under the Civil Aeronautics Act of 1938 the minimum safe altitudes of flight were those specified by the Civil Aeronautics Board. The rule that has been in effect since 1945 provides for minimum altitudes of 500 or 1,000 feet "except when necessary for take-off or landing". 14 C. F. R. §60.17 (1961). In a 1954 interpretation, the Board explained that this meant "that an aircraft pursuing a normal and necessary flight path in climb after take-off or in approaching to land is operating in the navigable airspace". Civil Air Regulations, Interpretation 1. 19 Fed. Reg. 4602 (1954) (also printed at 14 C. F. R. §60.17 (1961)). Congress ratified this position by adding the last clause to Section 101(24) of the new Act when the Federal aviation legislation was revised in 1958. See Senate Committee on Interstate and Foreign Commerce, *Text of the Federal Aviation Act of 1958, Showing Changes Proposed to be Made in Existing Law* (July 1, 1958), 85th Cong., 2d Sess., 3.

No state or local law can prohibit flying thus permitted under the Federal statutes (*Allegheny Airlines, Inc.* v. *Village of Cedarhurst*, 238 F. 2d 812 (2d Cir. 1956)). For the same reasons such flying cannot constitutionally be penalized by application of the state tort rules of nuisance or trespass.

Assuming, for the purposes of this brief (see footnote on page 3, *supra*), that plaintiff is constitutionally entitled to recompense from someone, the remedy which the Supreme Court of Pennsylvania has suggested would be of little practical value to him. In the instant case, plaintiff has neither attempted to show nor would it be possible for him to show what flights conducted by which carriers caused what interference with the use of his property. As the plaintiff testified, the aircraft here involved included many Air Force planes and private planes in addition to aircraft owned or operated by numerous different commercial carriers (R. 19-25), and there was no evidence or finding with respect to the altitudes, courses, frequencies or other characteristics of the flights of aircraft of one airport user as distinguished from those of all the others. It was for such reasons that the dissenting Justices of the Supreme Court of Pennsylvania thought the alleged right of recovery against the airport users to be illusory (402 Pa. 411, 430; 168 A. 2d 123, 132). If the difficulty in apportioning damages among various airport users led to the conclusion that an injunction against all flying over a landowner's property would be the appropriate remedy, the result would be even more intolerable. It would enable an adjacent property owner to prevent Pittsburgh or any other community from making an effective use of its airport, would place a direct and impossible burden upon interstate commerce, and in blocking proper development of an air transportation sys-

tem would prevent the creation of that fleet of modern commercial aircraft essential to the national defense.

To say that an airline should not be liable in damages or subject to injunctive relief sought where the peaceable enjoyment of property has been interfered with by lawful and necessary flights is not to say, however, that airlines and persons using them do not bear any part of the expense of securing avigation easements necessary to the operation of an airport. At all major airports, the landing fees, rentals and other users' charges which they pay are directly related to the costs of airport operations.

Such damage as plaintiff may have sustained was the result of action taken by the Federal Government and the County of Allegheny. If it resulted, on the facts assumed, in a final definite impairment of value, recompense could be made far more effectively and more appropriately through an award in eminent domain than in actions for trespass or nuisance against airport users. Such an award, furthermore, would in no way confuse the uniform application of Federal regulations or impede the development of air transportation.

The Supreme Court of Pennsylvania was of the view that because the airport operator, the County, never physically occupied plaintiff's land or the air over it, it could not be deemed to have "taken" plaintiff's property. But the concept of "taking" under the Federal Constitution is not so limited. When a dam 25 miles away raised the water level under farm land enough to destroy its usefulness for agriculture, the Government was held liable for a taking. *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799 (1950). Actual possession by the Government responsible for the destruction of property values is not necessary. "Taking," like other terms of the Constitution, is a

practical concept, to be interpreted in the light of practical considerations. And the same, of course, is true of the "deprivation of property" clause of the Fourteenth Amendment, which applies to the States.

Respectfully submitted,

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